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DRAFT REPORT

Addendum

II. DRAFT LEGISLATIVE PROVISIONS ON JUDICIAL COOPERATION AND ACCESS AND RECOGNITION IN CASES OF CROSS-BORDER INSOLVENCY

(continued)

Article 5. Authorization for administrators to act extraterritorially

1. The draft article as considered by the Working Group read as follows:

"An administrator appointed [in insolvency proceedings] in the enacting State is authorized to act [as foreign representative of those proceedings] [to take such steps as are necessary extraterritorially for the purposes of reorganizing the debtor's assets or affairs, or to liquidate the debtor's asset] in accordance with the orders of the court."

2. Some questions were directed as to whether it was necessary or appropriate to include a provision along the lines of article 5. For example, it was suggested that, at least as currently formulated, the provision might be read as attempting to directly confer on locally appointed administrators the power to take action in foreign jurisdictions.

3. In response, the Working Group expressed its general understanding that article 5 was merely intended to give authority to locally appointed administrators to petition foreign courts for assistance in accordance with the law of the foreign court. The scope and exercise of power abroad would depend upon the foreign law and courts. Article 5, it was noted, was not intended to

grant powers to the locally appointed administrator to take actions, including actions such as repatriation of assets, without authorization of the local court.

4. As to the utility of a provision along the lines of article 5, it was reported to the Working Group that such a provision would help to fill a gap found in some national laws, and would generally be in line with the aim of facilitating cooperation and coordination.

5. After deliberation, the Working Group was of the view that article 5 should be retained, and referred it to the drafting group for possible clarification of its intended scope and purpose.

Article 7. Relief available upon recognition of foreign proceeding

6. The draft article as considered by the Working Group read as follows:

"(1) For the purposes of providing assistance to a foreign proceeding, recognition of a foreign proceeding by a competent court

(a) operates as a stay,

(i) against the commencement or continuation in the enacting State of judicial, administrative or private actions against the debtor or its assets, except

OPTION I

collective proceedings for liquidation or reorganization in the enacting State

OPTION II

[, subject to paragraph (2),] proceedings for the enforcement of [secured creditor claims] [rights in rem], [seizures of assets that have already been obtained prior to recognition of the foreign proceeding],

OPTION III

proceedings for the purposes of police or regulatory enforcement,

and

(ii) against the transfer of any interests in assets by the debtor, except transfers [made in the ordinary course of business] [or] [for the purposes of completion of open financial market transactions]

(b) authorizes the foreign representative to obtain a court order compelling testimony or the delivery of information in written or other form by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes [the court to issue an order permitting] the foreign representative to take custody and management of assets of the debtor, [subject to] [with the exception of assets encumbered by] rights in rem [and subject to exclusion of [personal] [family] property exempt from insolvency administration under the laws of the enacting State;

(d) authorizes the foreign representative to intervene in collective proceedings for liquidation or reorganization in the enacting State;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief, including continuation of provisional measures granted pursuant to paragraph (2), as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened, to the extent that such relief is not prohibited by or inconsistent with the laws of [the enacting State] [, including without limitation actions for voidness, voidability or unenforceability of legal acts detrimental to all creditors that may be available under the law of the enacting State [or under the law of the jurisdiction in which the foreign proceeding was opened], [subject in all cases to:

(i) the procedural requirements of the court, and

(ii) the protection of [local] creditors against undue prejudice or inconvenience];

(f) authorizes the courts of the enacting State to cooperate with the foreign court that opened the foreign proceeding, in accordance with article 11.

"(2) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings has been decided by the court.

"(3) The judgement opening foreign proceedings emanating from a State [referred to in article 6(1)(variant C)] in which is located the centre of the debtor's main interests ['main proceedings'], produces the same effects as under the law of the State of the opening of the proceedings [, except ... ,] and as long as no proceedings referred to in article 18(1)(variant B)(option I) are opened in the enacting State.]"

7. The Working Group noted that the text before it reflected the level of discussion and agreement tentatively achieved at the previous session with regard to the question of the "effects" that would flow from recognition.

8. Under the approach developed at the previous session, certain "minimum" effects would result more or less automatically from recognition. Those included in particular a stay of individual creditor actions and of transfers by the debtor of interests in assets, management and custody of assets for the foreign representative, authorization of information gathering concerning the assets and affairs of the debtor, and the possibility for the foreign representative to seek from the court additional relief appropriate in the circumstances. Various exceptions, ranging from public policy grounds to exceptions of secured claims from the stay provisions, were included.

9. Differing views were exchanged as to the above tentative framework. One view was that such an approach would work to the disadvantage of creditors in the enacting State, by granting broader powers to the foreign representative to act in the enacting State on behalf of foreign creditors than the power that would be left to the local creditors. It was suggested that simply staying individual creditor actions could have the effect of preventing local creditors from establishing themselves as creditors, in particular as their claims might be in dispute. For these reasons, the Working Group was urged to limit the relief available upon recognition to the authorization to the foreign representative to petition the court for appropriate relief, along the lines of paragraph (1)(e).

10. In response to that view, it was emphasized that the intent of article 7 was not to accord advantages to any one particular category of creditors, in accordance with one of the basic principles of the draft text, equal treatment of creditors. Reference was made to the advantages that would accrue to all creditors, both foreign and local, by the enhancement of asset value and the prevention of dissipation of assets possibly provided by the stay.

11. It was also noted that, as understood at the previous session, the provisions were not intended to empower the foreign representative to act directly in the enacting State without the authorization and oversight of the local court. Neither was article 7 intended to provide for automatic repatriation of assets in the event of recognition. Rather, what was envisaged was the creation of a breathing space to permit the possibility of coordinated action to deal with a cross-border insolvency, including possibly steps by the foreign representative to preserve and manage assets.

12. It was further noted that, were the model provisions limited to giving the foreign representative the right to petition a court for relief, this would not represent significant progress beyond the currently prevailing situation. The right to petition a court was already available to the foreign representative in many legal systems and alone had not provided the generally desirable degree of predictability or speedy and efficient action needed for dealing with cross-border insolvency.

13. Various interventions suggested that the stronger effects of recognition referred to in article 7 should be reserved for cases in which the foreign proceeding was a "main" proceeding, i.e., one originating from the jurisdiction in which the debtor was, by way of one or another formulation, headquartered. Such an approach was justified on the grounds that an effect such as a stay of individual creditor action or a freeze on the debtor's transfers of assets was

tantamount to the opening of a local insolvency proceeding. Granting a similar degree of relief to a foreign proceeding in which the originating court had jurisdiction merely on the basis of presence of assets was said to be inappropriate as a general rule.

14. With the prevailing view for an approach along the lines of article 7, the Working Group considered adjustments that might be made to the text to better specify the intended content and scope of the relief envisaged, and to address the concerns raised in earlier interventions.

15. In particular, the Working Group agreed that relief in the nature of an automatic stay of individual creditor action and freezing of transfer of assets should be limited to cases in which the recognized foreign proceeding was a "main" proceeding. There also was broad agreement that the draft text should make it clearer that the stay was in fact limited to individual creditor actions and was, in particular if it were granted as an interim measure, of a provisional character, in the sense that it would be lapsing unless affirmed or prolonged by the court subsequently.

16. It was noted at the same time that the draft text did not disturb the right that local creditors might have under the law of the enacting State to proceed collectively against the debtor, since collective actions were exempt from the stay. Neither did the provision attempt to deal with questions of distribution of assets or priority of claims. It was also noted that under this approach certain other exemptions could be available as regards the stay, including public policy, secured claims and rights in rem as understood according to the law of the enacting State.

17. The Working Group also noted observations to the effect that the relief accorded upon recognition should not exceed the relief that would result from the commencement of insolvency proceedings in the enacting State, or the powers accruing to a locally appointed administrator. An additional point of reference, which it was said should also not be exceeded, was the relief available to the foreign representative in the originating jurisdiction. Suggestions for facilitating such an alignment included a formulation that recognition would have the same effects as the opening of a local proceeding. It was said that such an approach might help to limit the need to provide various exceptions.

Subparagraph (a)

18. Beyond the limitation of the stay in subparagraph (a) to foreign main proceedings, agreed by the Working Group as described above, several other modifications of the stay provisions were considered.

19. In order to make it clear that the draft provisions were not intended to have the effect of disadvantaging local creditors, it was suggested that the stay of individual creditor actions should be limited to actions of execution against assets. The Working Group agreed that such a limitation of the stay to actions of execution should be offered as an option. It was also suggested to refer specifically to the preservation of the right of local creditors to file their claims in foreign proceedings.

20. The Working Group also agreed that the reference in subparagraph (ii) to freezing of transfers by the debtor of interests in assets could be expanded to include a freezing of payments by the debtor. It was further agreed that exceptions to the freeze on transfer of assets (e.g., transfers in the "ordinary course of business", such as payment of wages) would be left to the local court. In order to give a reference to the court in determining that question, as well as other questions relating to the details of and exceptions to the stay under subparagraph (a), the Working Group agreed to include an option for enacting States. That approach would determine the scope and extent of the stay, under one option, in accordance with the law of the enacting State governing such stays. Another option would be to make that determination in accordance with the law of the originating jurisdiction.

[to be continued]